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IN THE

Supreme Court of the United States

October Term, 1966
No. 67

HELEN MAXINE LEVI TRAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR THE PETITIONER.

Opinions Below.

The memorandum opinion of the District Court denying petitioner's motion to dismiss [R. 42-47] is reported at 241 F. Supp. 468. The memorandum opinion of the District Court finding petitioner guilty as charged [R. 94-100] is reported at 241 F. Supp. 472.

The opinion of the Court of Appeals below affirming petitioner's conviction [R. 109-112] is reported at 353 F. 2d 506.

Jurisdiction.

The judgment of the Court of Appeals was entered November 19, 1965. [R. 112.] A timely petition for rehearing was filed December 17, 1965, and was denied on January 4, 1966. [R. 113.] The petition for certiorari was filed January 28, 1966, and was granted April 18, 1966. [R. 113.] The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Statute, Regulations and Proclamations Involved.

The statutory provision involved herein is 8 U.S.C. Sec. 1185 (Sec. 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190) (hereinafter referred to as Section 1185), which appears herein in Appendix A. The regulation involved herein is State Department Regulation No. 108.456, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3 (hereinafter referred to as the Excluding Cuba Regulation), which appears herein in Appendix B. (For convenience, 22 C.F.R. Secs. 53.1, 53.2 and 53.3 as existing prior to the Excluding Cuba Regulation also appear herein in Appendix C.) Public Notice 179 (26 Fed. Reg. 492) and Press Release No. 24 (44 Dept. St. Bull. 178), issued by the State Department concurrently with the Excluding Cuba Regulation, appear herein as Appendices D and E, respectively.

Presidential Proclamation No. 3004 (January 17, 1953, 67 Stat. C31), issued under Section 1185 and to give that statute effect, appears herein in Appendix F. Presidential Proclamation No. 2914 (December 16, 1950, 64 Stat. A454), referred to in Proclamation No. 3004 above, appears herein as Appendix G.

Questions Presented.

In *Kent v. Dulles,* 357 U.S. 116, this Court distinguished between the civil side of the passport power (dealing with the granting or withholding of the diplomatic, safe-passage protections of passports) and the criminal side dealing with prohibitions upon exit from the country. In *Zemel v. Rusk,* 381 U.S. 1, the Court upheld the power of the Secretary of State to withdraw the safe-passage protections of a passport from one travelling to Cuba, but expressly left open the ques-

tion as to the Secretary's power to criminally prohibit such travel under the exit-control sanctions of 8 U.S.C. Sec. 1185.

The instant case presents that reserved question.

More completely stated, the question presented is whether the Excluding Cuba Regulation (with accompanying Public Notice and Press Release), eliminating Cuba from the area for which passports are not required and requiring a special validation, allowable only in total discretion, for travel thereto, can support a *criminal* prosecution under 8 U.S.C. Sec. 1185 for a claimed violation thereunder, including under that fundamental question the following subordinate issues:

(1) Whether Section 1185 (as distinct from the *civil* Act of July 3, 1926, involved in *Zemel v. Rusk*) grants statutory authority, backed by *criminal* sanction, for an area restriction upon travel such as the purported Excluding Cuba Regulation at bar;

(2) Whether said Regulation, in light of prior legislative and administrative history and administrative declarations indicating area restrictions are civil only in nature, and not criminal, and in light further of the considerations stated in (3) below, can be enforced under Section 1185 as a criminal prohibition without violating the requirements of due process of law prohibiting vagueness, contradiction and misleading terms in the communication of a criminal command;

(3) Whether said Regulation can be enforced with *criminal* sanctions under Section 1185 although the said Regulation was *expressly* not promul-

gated under authority of Section 1185 but only under authority of the *civil* Act of July 3, 1926, which bears no criminal penalty for violation of regulations issued under its terms;

(4) Whether Section 1185, if construed to authorize issuance thereunder of criminal area travel prohibitions, unconstitutionally delegates legislative power without adequate or any standards;

(5) Whether Section 1185 and the Excluding Cuba Regulation, if construed to authorize a criminal restraint against travel to Cuba, including particularly restraint whereunder special validation for such travel is allowable only under unconfined, absolute administrative discretion, deprives petitioner of personal liberty and of freedom of speech, thought and association contrary to the First and Fifth Amendments;

(6) Whether Presidential Proclamations Nos. 3004 and 2914 possess presently continuing validity and effect sufficient to support imposing under Section 1185 of regulations criminally prohibiting travel to a described area or country;

(7) Whether Section 1185 and the Excluding Cuba Regulation can properly be applied to a departure not directly to Cuba but only to Mexico, with application to Cuba for permission to enter being made only *after*, not prior to, United States departure.

Statement of the Case.

Petitioner (hereafter referred to as the defendant) was convicted below on two counts for claimedly violating Section 1185, and the Excluding Cuba Regulation under it. The indictment charged that upon two occasions, on January 22, 1962 and on August 18, 1962, defendant "did . . . depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico. . . ." [R. 1-2.]

Section 1185 provides in core that after a Presidential proclamation of a "national emergency" (proclaimed in Presidential Proclamations Nos. 3004 and 2914[1]), and after a further presidential proclamation of necessity[2] (proclaimed in Proclamation No. 3004, *supra*), it shall be a crime for any citizen "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport", "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe."

Prior to the Excluding Cuba Regulation it was provided in 22 C.F.R. Secs. 53.1 *et seq.*, issued under au-

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[1]Presidential Proclamation No. 3004, 67 Stat. C31, Appendix F *infra*, was proclaimed January 17, 1953. It recited the "national emergency" proclaimed in Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, Appendix G *infra*, and declared that emergency "still exists." It is disputed under Point VI that Proclamations Nos. 3004 and 2914 were still valid and effective at the time of defendant's acts of travel concerned herein in 1962.

[2]The requirement is that the President find and proclaim "that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States". Presidential Proclamation No. 3004 so found and proclaimed.

thority of Section 1185, that passports should be required of all citizens to enter or leave the United States except that no passport should be required for citizens "traveling between the United States and any country or territory in North, Central or South American or any island adjacent thereto . . ." (22 C.F.R. Sec. 53.3, Appendix C, *infra.*)

The Excluding Cuba Regulation (Regulation No. 108.456, January 16, 1961, 26 Fed. Reg. 482), and Public Notice 179, 26 Fed. Reg. 492, and Press Release No. 24, 44 Dept. St. Bull. 178, issued simultaneously therewith, purport collectively to at once remove Cuba from the area under 22 C.F.R. Sec. 53.3 within which citizens may travel without a passport, and simultaneously to declare passports invalid for Cuban travel without a special validation allowable only in total administrative discretion.

Specifically, Regulation No. 108.456 purported to amend 22 C.F.R. Sec. 53.3 to insert in the language there exempting from requirement of a passport travel to "any country . . . in North, Central or South America or in any island adjacent thereto" the phrase, "excluding Cuba", and thereby to require a passport for Cuban travel. Simultaneously Public Notice 179 declared all passports "invalid for travel to or in Cuba . . . unless specially endorsed for such travel under the authority of the Secretary of State", and Press Release No. 24 declared "exceptions" to the prohibition on Cuban travel would be granted by the Secretary only "to persons whose travel may be regarded as being in the best interests of the United States . . ."

None of these "Excluding Cuba" public acts and documents—Regulation No. 108.456, Public Notice 179

or Press Release No. 24—cited or referred to Section 1185 in any way as authorizing or promulgative authority. *To the contrary, both* Regulation No. 108.456 and Public Notice 179 *expressly* cited as their *sole* promulgative authority only the *civil* Act of July 3, 1926 (44 Stat. 887, 22 U.S.C. Sec. 211a), a statute imposing *no criminal penalty* for violation of regulations issued under its authority.

Thus the promulgative paragraph of Regulation No. 108.456, excerpted for clarity, recites expressly the authority of the Act of July 3, 1926, stating:

> "Pursuant to the authority vested in me by . . . the act of . . . July 3, 1926 . . ., I hereby amend paragraph (b) of [22 C.F.R. 53.3] as follows: . . ." (26 Fed. Reg. 482.)[8]

In similar manner, Public Notice 179 states simply:

> "Therefore pursuant to the authority . . . of . . . the Act . . . of July 3, 1926 . . ., all United States passports are hereby declared to be invalid for travel to or in Cuba . . ." (26 Fed. Reg. 492.)

As to the prosecution below there are no disputed facts. Defendant was tried by the court with a jury waived, upon an agreed "Stipulation of Facts." [R. 49-52.]

It recites that defendant at all material times was and is a citizen [R. 49, par. 2]; that at all material times she knew the provisions of Section 1185 and of 22 C.F.R. Secs. 53.2 and 53.3 [R. 51, par. 11]; that at all material times she did not possess a valid United States

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[8]The promulgative clause also referred to the Act of May 26, 1949, 63 Stat. 111, 5 U.S.C. Sec. 151c, the general rule-making statute affecting the Secretary of State.

passport specifically endorsed for travel to Cuba [R. 51, par. 11]; and that on January 22, 1962 and on August 18, 1962 defendant "intentionally left and departed from the United States" by plane on the first date and by automobile on the second date. [R. 50-51, pars. 4 and 7.]

The Stipulation recites that defendant did not in either instance depart directly for Cuba but rather for Mexico, intending in each instance to seek permission to travel to Cuba only after her arrival in Mexico. [*Id.*]

In each instance defendant entered Mexico upon a tourist permit issued by that country's government, and at the time of departing "intended to seek permission from representatives of the Republic of Cuba in Mexico, D.F., to visit Cuba." At the time of each departure from the United States she "did not have Cuba's permission to enter Cuba" and she obtained that permission only after arrival in Mexico. [R. 50-51, pars. 4 and 7.] On the first occasion that permission was obtained four days after arrival in Mexico City, and on the second, twelve days after such arrival. [*Id.*] After the requisite permission had been obtained for entry into Cuba, defendant traveled from Mexico City to Cuba by plane. [R. 50-51, pars. 5 and 9.]

After her arrival in Cuba on each of her said journeys thereto defendant travelled in and about Cuba observing "the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health" and in the course of such travels took a number of pictures of which Exhibits 1A to 1M are representative. [R. 51-52, par. 12.] Upon her return to the United States and to

her home in Los Angeles, California, defendant appeared before "various groups and gatherings of her fellow citizens" and reported to them her observations upon her travels in Cuba and showed her photographs, Exhibits 1A to 1M. In addition defendant wrote descriptions of her trips and her observances in Cuba which she disseminated by mail to friends and acquaintances, and the copy of her letter dated February 28, 1962, Exhibit 2, is representative of such materials. [R. 52, par. 13.] The Stipulation of Facts was duly filed and Exhibits 1A to 1M and 2 were duly admitted in evidence. [R. 53.]

By a written motion to dismiss the indictment [R. 3-4] and by an oral motion for judgment of acquittal [R. 53], each supported on leave by written briefs [R. 5-18 and 54-73], defendant challenged in the trial court the statute and the Regulation on their face and as applied, upon grounds substantially as expressed herein in the Statement of Questions Presented above. Both said motions were denied. [R. 42-47 and 94-100.] Defendant was adjudged guilty on both counts of the indictment and was sentenced on each count to a fine of $500 and to six months imprisonment, suspended on probation. [R. 102-103.]

On appeal the Court of Appeals below affirmed. [R. 109-112; 353 F. 2d 506.] The Court of Appeals disallowed defendant's contention that Section 1185 did not authorize area travel restrictions under its criminal sanctions, citing only *Zemel v. Rusk* (though that decision involved only the *civil*, safe passage aspect of such restrictions and expressly reserved the question of criminal authority under Section 1185), and observing only that, "Area restrictions have long been used and are recognized as valid." [R. 111; 353 F. 2d at p. 508.]

The Court of Appeals further rejected defendant's contention that the statute and Regulation denied due process for vagueness and contradiction in the communication of a criminal command, citing only the circumstance that the Stipulation of Facts recited defendant "knew" the contents of Section 1185 and the Excluding Cuba Regulation. The Court of Appeals misread this Stipulation as signifying defendant "knew" the *meaning* of the statute and Regulation as claimed and contended for by the Government. The true stipulation was only that defendant "knew the provisions of Section 1185(b) of Title 8, United States Code and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." [R. 51, par. 11.] This does not at all stipulate to knowledge of the meaning or effect of the statute or Regulation as claimed by the Government.[3a]

The Court of Appeals further disallowed defendant's contention that her departure in the circumstances described in the Stipulation of Facts as heretofore summarized did not in any event constitute a departure *for* Cuba within the prohibition of the statute and Regulation, stating only that if the contrary be held "the intent of Congress would be entirely obviated and the statute and regulation nullified." [R. 112; 353 F. 2d at p. 508.] The Court below did not address itself to the remainder of the defendant's contentions.

Also before this Court, joined for argument with the instant case, is the related prosecution in *United States v. Laub* (E.D.N.Y., 1966) 253 F. Supp. 433, probable jurisdiction noted in 384 U.S. 984. There the defendants, who possessed passports but without special valida-

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[3a]The circumstance was pointed out in the Petition for Rehearing filed below.

tion for travel to Cuba and who were prosecuted as at bar under Section 1185, were acquitted by the trial judge who found Section 1185 inapplicable to lend criminal sanctions to area travel bans.

Summary of Argument.

We deal here with the exit control function of the passport power, not its diplomatic function as a request for the traveler's safe passage. This case presents the question reserved in *Zemel v. Rusk,* 381 U.S. 1, whether the exit control sanctions of 8 U.S.C. Sec. 1185 can be used to enforce area restrictions on travel.

(1) The terms and the legislative and administrative history of Section 1185, and of its two predecessor statutes, the Act of May 22, 1918 (40 Stat. 559) and the Act of June 21, 1941 (55 Stat. 252), of which it is an exact reenactment, combine to demonstrate that Section 1185 does not authorize issuance under its criminal sanctions of geographical travel restrictions upon a traveler's destination. The terms of the statutes do not suggest authority for such restrictions, and the legislative history of the 1918 and 1941 Acts makes it clear that those statutes were expressly intended as war-emergency *border-control* measures only, designed to prevent border crossings by spies and enemy agents. The purpose was to regulate travelers, not destinations. No different intent was expressed in the passage of Section 1185 as a reenactment of the prior statutes.

There has been a consistent pattern of administrative construction of the current and predecessor statutes as providing no criminal penalty for the enforcement of frequently imposed area restrictions. The geographic limitations imposed, beginning as early as 1919, were

cast in safe passage request terms only, without suggesting criminal consequences for noncompliance. In certain instances the existence of criminal sanctions to enforce the restrictions was specifically disclaimed, and the safe-passage nature of the limitation was emphasized. One of these was published in 1952 while the present Section 1185 was under consideration by the Congress. Another was presented to the Congress in 1957 as the carefully considered position of the Department of State. The President and the Department in 1958 specifically requested the enactment of sanctions to compel compliance with area restrictions. In the legislative studies that followed, the Chairman of the Senate Committee on Foreign Relations advised the Congress that the law was deficient in failing to provide such sanctions. The Congress failed to enact the legislation. Finally, the government has admitted that since the enactment of Section 1185 in 1952 there have been approximately 600 known violations of its area restrictions. But the first attempts to invoke criminal penalties have been confined to the restrictions on travel to Cuba: the instant case, initiated in 1963; *United States v. Laub,* instituted in 1964; and *Worthy v. United States* (C.A. 5, 1964), 328 F. 2d 386, involving an entry rather than a departure.

Consistent with the Department's long construction of area travel restrictions as noncriminal measures, the Excluding Cuba Regulation, issued January 16, 1961, and Public Notice 179 which accompanied and publicized the Regulation, were cast in the form of a civil, safe-passage measure only. Both the Regulation and the Public Notice cited as promulgative authority only the civil Act of July 3, 1926 (44 Stat. 887, 22 U.S.C. Sec.

211a), not Section 1185, and the Public Notice, reciting as the cause of the restriction "the absence of diplomatic relations" with Cuba, declared only that under the authority of the Act of July 3, 1926 "all United States passports are hereby declared to be invalid for travel to or in Cuba."

By its terms, and by legislative history and by years of consistent administrative construction, Section 1185, like its predecessors, is inapplicable to area restrictions and does not authorize the imposition of such restrictions under its criminal sanctions.

(2) Moreover, even if it be assumed Section 1185 could now be construed to lend criminal sanctions to area restrictions, in light of the ambiguity of the statute and the many explicit and implicit Departmental acts and statements indicating area restrictions are not enforceable under the statute, to uphold criminal liability at bar would violate due process requirements forbidding vagueness, contradiction and misleading terms in the communication of a criminal command.

The face of the statute discloses no purpose to authorize area restrictions. The legislative history of the statute and its exact predecessors shows an express intent to impose only border control over certain types of persons—to regulate travelers, not destinations. The administrative interpretation forms a consistent pattern of area restrictions in the form of refusals to request safe passage, and criminal prohibitions have not been mentioned. As of the time of the offense charged here, there had never been a prosecution under Section 1185 or its predecessors for violation of any of the area restrictions; nor had there been any declaration that any

of the earlier area restrictions were or could have been issued with criminal exit control sanctions under Section 1185 or its predecessors.

On the contrary there have been affirmative, authoritative administrative *disclaimers* of criminal sanctions. The Department of State itself in 1952 declared that area restrictions "in no way forbi[d]" free travel in violation of their terms but constitute merely "additional steps to warn American citizens of the risks of [unsanctioned] travel." Further in 1957 the Department advised the United States Senate upon official inquiry that travel to an area-restricted country "does not . . . [in itself] violat[e] the criminal law," although criminal laws may be violated in the *course* of such travel and the traveler must understand that he "cannot be assured of the protection of the United States."

All of these matters of record tell the citizen that travel to the disapproved areas is not regarded as a crime. To prosecute thereafter turns this contrived structure of administrative regulations into a trap even for the wary. To suffer criminal conviction in such premises "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." (*Raley v. Ohio*, 360 U.S. 423, 426; *Cox v. Louisiana*, 379 U.S. 559, 571.)

Moreover, all of the foregoing circumstances are climaxed finally by the promulgation clause of the Excluding Cuba Regulation itself, and by Public Notice 179 which accompanied and publicized the Regulation, both of which cite as promulgative authority only the civil Act of July 3, 1926, not Section 1185. The Public Notice, reciting as the cause of the restriction "the ab-

sence of diplomatic relations" with Cuba, declares only that under the authority of the Act of July 3, 1926 "all United States passports are hereby declared to be invalid for travel to or in Cuba."

In all of these premises it appears difficult to deny that defendant, or any other citizen, might reasonably read the Excluding Cuba Regulation in the light of all of these circumstances as communicating no criminal-sanction area travel prohibition. Defendant did not reach the wrong interpretation of the regulatory maze. Rather the Government reversed its field by professing to impose no criminal sanction and after the defendant's travel doing the very opposite. Due process forbids contradictory, misleading or vague criminal commands. (*United States v. Cardiff*, 344 U.S. 174, 176-177.)

(3) Additionally, even if it be assumed that Section 1185 authorizes the issuance under its criminal sanctions of area travel prohibitions, violation of the Excluding Cuba Regulation can be no crime at bar because that Regulation was not *promulgated* under the sanctions of Section 1185 but was *expressly* promulgated *only* under the authority of the *civil* Act of July 3, 1926, *supra*, a statute imposing no criminal sanctions for violations of regulations issued under its terms.

The citizen cannot be held criminally liable for violation of a regulation issued under a statute which does not make such a violation a crime.

(4) Construed to authorize area travel restrictions, Section 1185 unconstitutionally delegates legislative power without adequate or any standards. *Zemel v. Rusk* dealt with delegation of legislative authority only as to the civil side of the passport powers; delegation

under a criminal statute, as at bar, must be more strictly judged. (*Fahey v. Mallonee,* 332 U.S. 245, 249-250.) Moreover, at bar there is no history of administrative construction to support criminal area restrictions such as existed in *Zemel* to support civil area restrictions. In *Zemel* such administrative construction was the base premise of the sustaining of the claimed power. Such premise cannot operate here. Without administrative aid, the statute must fail for improper delegation of legislative power, for there are *no* delegation standards whatever expressed in the statute's terms.

(5) Additionally, construed to authorize the Excluding Cuba Regulation at bar, Section 1185 deprives defendant of personal liberty and of freedom of speech, thought and association contrary to the First and Fifth Amendments. The liberty of travel is "basic in our values." It is "closely related to the rights of free speech and association" (*Aptheker v. Secretary of State,* 378 U.S. 500, 517), and in Chafee's words it "enables American citizens . . . to be well informed on public issues" and "contributes to sounder [democratic] decisions."

Defendant's travel to Cuba was in this tradition. She sought to visit Cuba to observe first hand the living conditions of the people and the social and economic program of the new government. On her return she reported to gatherings of fellow citizens what she had seen. Thus did she as one citizen attempt to participate in the nation's opinion-making processes.

We deal here with the criminal power to prohibit travel altogether, even as to citizens willing to travel without diplomatic passport protection. This court

should reaffirm that under the First and Fifth Amendments the Government may not prohibit and punish such free, innocent travel. Punishment so imposed is inconsistent with the protected liberties of a self-governing nation.

Moreover the restriction on travel at bar vests the Secretary with absolute, censorial power to allow travel to Cuba only when and where he deems such "in the best interests of the United States." Such arbitrary, censorial licensing power over travel particularly offends Constitutional fundamentals. (*Cox v. Louisiana*, 379 U.S. 536, 555-557; *Thornhill v. Alabama*, 310 U.S. 88, 97; *Kunz v. New York*, 340 U.S. 290, 294.)

(6) Even if Section 1185 be otherwise applicable to area travel restrictions there exist at bar no sufficient Presidential proclamations of need and emergency to satisfy the statute's explicit terms.

Firstly, there is no proclamation whatever of need for *geographical* travel restrictions, either generally or as to Cuba as a particular instance. Section 1185 is a criminal statute and must be narrowly construed, and its precondition that departure restrictions must be found to be "require[d]" by "the interests of the United States" must be liberally enforced in favor of the accused so as to require for area departure restrictions a finding of specific need for such particular restrictions, either individually or at least as a category.

Secondly, both Proclamations Nos. 2914 and 3004 (issued December 16, 1950 and January 17, 1953, respectively) are bottomed on the emergency of the Korean War existing at the time of their proclamation; that foundational premise of both proclamations ceased with

the end of that "war" emergency on July 27, 1953. (13 Encyc. Brit. 467, 474.) This Court is not controlled by an outdated executive proclamation of an emergency which by passage of time has ceased to exist. It has the authority to inquire as to whether there is in fact such a national emergency in existence today as can support the restriction upon liberty of travel represented by the Regulation at bar. (*Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-548; *Baker v. Carr*, 369 U.S. 186, 214.)

(7) In any event defendant's conduct did not violate Section 1185 properly construed and Constitutionally limited. Defendant departed not for Cuba but for Mexico, and only *after* her United States departure, and *after* her arrival in Mexico on the occasion of each of her trips, did she apply for and ultimately secure Cuban permission to enter Cuba. Accordingly, at the time of each of her "departures" from the United States she had no *ability* to, and she did not, "depart" from the United States "*for* the Republic of Cuba" within the meaning of Section 1185.

Section 1185 covers only *departure*; it operates only on the facts existing at the moment of such departure. To say that departure can be rendered penal by a *subsequent* seeking and obtaining of permission to enter Cuba is to defy reason and to make the statute arbitrary and void in its application under due process fundamentals.

ARGUMENT.

I.

Congress in Enacting Section 1185 Did Not Authorize the Issuance Thereunder of Criminal-Sanction Area Travel Bans.

In *Kent v. Dulles,* 357 U.S. 116, this Court distinguished (pp. 120-123, and 129) between the *two* separable functions of passports—the first as a *civil* diplomatic act of granting or withholding requests for safe passage, and the second as an instrument of *criminal* exit-control. *Zemel v. Rusk* dealt with the *civil* function of the passport for purposes of travel to Cuba and held as to that matter—the *civil* withholding of request for safe-passage—that the civil Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. Sec. 211a, granted the Secretary authority to impose area travel restrictions and thereunder to refuse to issue Cuban travel passports. However, this Court there *expressly* reserved the question "whether [a person] can be criminally prosecuted under . . . 8 U.S.C. Sec. 1185(b) . . . for travel in violation of an area restriction." (381 U.S. at p. 18.) That reserved question is now posed here. And the first issue presented under that question, before Constitutional issues or particular contentions are reached, is whether Congress in enacting Section 1185 *authorized* the imposition of criminal area travel prohibitions or restrictions. Examination will demonstrate that it did not.

(1) The legislative history of Section 1185, enacted June 27, 1952, demonstrates that it was no part of the purpose of Congress in enacting that Section to authorize the imposition thereunder of criminal area travel prohibitions.

Section 1185, like its two predecessor statutes of which it is in the respects here material an *exact* reenactment, is a departure-and-entry statute purposed at *border control.* In material terms it makes it criminal, when its provisions are in effect during emergency and by proclamation, for any citizen "to depart from or enter" the United States "unless he bears a valid passport" subject to such "exceptions as the President may . . . prescribe."

The Section derives originally from the Act of May 22, 1918, 40 Stat. 559 (hereafter cited simply as "the 1918 Act"), which as a World War I measure was expressly made operative only "when the United States is at war." That Act prohibited citizen entries and departures in exactly the same terms as quoted above under present Section 1185.

The 1918 Act expired in effect as to World War I by Congressional resolution on March 3, 1921. (41 Stat. 1359.) Thereafter, in 1941 Congress passed the Act of June 21, 1941, 55 Stat. 252 (hereafter cited as "the 1941 Act"), amending the 1918 Act to make its terms and provisions (which were left unchanged) effective either during war or during the then existing "national emergency" proclaimed by the President on May 27, 1941. The 1941 Act was continued in operative effect by Congressional joint resolutions (66 Stat. 54, 57; 96; 137; 330, 333) to and beyond June 27, 1952, on which date Congress enacted Section 1185. Section 1185 repealed the 1918 and 1941 Acts (66 Stat. 279) and simultaneously reenacted their substantive terms in unchanged form so far as here material (66 Stat. 190), thus continuing in effect and reenacting the restrictions upon citizen entries and departures exactly as ex-

pressed in the earlier Acts. Under Section 1185 these restrictions were made operative either during "war" or during "any national emergency proclaimed by the President."[4]

There is virtually no legislative history surrounding Congress' enactment of Section 1185 except the single, vitally important fact, as developed in detail under Section (2) hereafter, that in the very midst of Congressional consideration of the bill which included Section 1185 the Department of State issued its official public statement, May 1, 1952, announcing (despite the then full effectiveness of the 1918 and 1941 Acts) that its area passport restriction issued that day, invalidating passports for travel to East European countries, China and the Soviet Union, "in no way forbids" citizen travel to the affected areas.[5] This Department statement came just two months before the enactment of Section 1185 on June 27, 1952 and climaxed, as hereafter detailed, a history of administrative practice during the operative periods of the 1918 and 1941 Acts indicating those Acts were not conceived to impose criminal restraints upon area-restricted travel.

The only direct Congressional legislative history attending the enactment of Section 1185 is the simple statement in the House Report (H. Rep. 1365, 82nd Cong. 2d Sess., p. 53) that the provisions of the new

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[4]All three of these statutes in addition to being conditioned upon either the existence of war or of a proclamation of national emergency, required as well that the President first find and proclaim a necessity in "the interests of the United States" for "restrictions and prohibitions in additions to those provided otherwise than by this [Act] . . . upon the departure of persons from and their entry into the United States."

[5]Press Release No. 341, 26 Dept. St. Bull. 736, discussed *infra*, section (2).

act (Section 1185) "are incorporated in the bill in practically the same form as they now appear in the Act of May 22, 1918 [as continued in force by the Act of June 21, 1941]." Accordingly the true legislative history of Section 1185 is, in a substantive sense, the legislative history of its two *exact* predecessors, the 1918 and 1941 Acts. (*Kent v. Dulles,* 357 U.S. 116, 137, dissenting opinion; *United States v. Plesha,* 352 U.S. 202, 205.) The history of those Acts, as will be seen, demonstrates clearly that they were conceived and intended as entry and departure, border-control statutes only, designed primarily to prevent entries or departures by spies, couriers or citizen foreign agents, and were not intended to impose or to authorize under their criminal sanctions geographical area travel prohibitions restricting the travel of persons lawfully qualified to travel generally. They were meant to regulate *travelers* not to censor *destinations.*

(a) Thus, firstly, the legislative history of the original parent act, the Act of May 22, 1918, abundantly demonstrates that Congress' object and concern in creating that Act was to deny exit and entry to any persons engaged during the then existing war in activities in the interest of Germany and her allies. The purpose was to close the borders to all entries or exits not scrutinized through the requirement of a passport, and by such scrutiny to exclude spies, saboteurs and agents of the enemy.

President Wilson, in calling upon Congress for the 1918 legislation said it was required because the exigencies of the war made it "necessary . . . to create a very definite and particular control over the entrance and departure of all persons into and from the United

States." (56 Cong. Rec. 18, 20.) The House Report upon the measure observed that existing law "leaves American citizens and neutrals perfectly free to come and go" across United States borders even though engaging in espionage or related activities, or suspected thereof, and concluded, "New legislation is the only remedy." (H. Rep. No. 485, "Control Of Travel From and Into The United States", 65th Cong. 2d Sess., pp. 2-3)

In the Senate debates the spokesman for the bill said it was "supplementary to the espionage laws" and that its "chief object" was to scrutinize and deny border passage to "aliens and alien enemies and renegade citizens" engaging in or subserving espionage who "can now enter and depart without any power . . . [in the Government] to intercept or delay them." (56 Cong. Rec. 6192.) In the House debates the House spokesman said the bill was "a much-needed measure to stop a gap" in the law; he said its "purpose is to give . . . the Government power to control ingress to and egress from the country", power then lacking "even [as to] people suspected of not being loyal . . . [or] in the employ of enemy governments." (56 Cong. Rec. 6029.)

Time and again in the debates on the 1918 Act the purpose is reiterated to impose *border control*, to scrutinize all travelers in order to identify and deny exit or entrance to spies, agents and couriers and persons who have violated or are fleeing from the law.[6] *Nowhere* in the debates is there even a suggestion of any purpose to either authorize or impose any regulation of the *destinations* of citizens innocent of any such character-

[6]56 Cong. Rec. 5970, 6029-6031, 6066-6067, 6191-6192, 6194-6195 and 6248.

istics.[7] Within the contemplation of Congress' plain and evident purpose a citizen once qualifying generally for a passport, and thus for exit, might travel freely wherever he might please.

(b) The legislative history of the 1941 Act, the Act of June 21, 1941, is in all respects similar. The House spokesman for the 1941 bill, in the House debates, declared the bill's "sole purpose" was to create "a sort of clearing house" over persons entering and leaving the country to ascertain "their reasons why they were going or coming . . . and whether they were engaged in espionage, and whether their coming in or going out would be inimical to the interests of the United States." (87 Cong. Rec. 5052.) There was no purpose to interfere with the free and full right to travel of anyone qualifying for and entitled to the issuance of a passport. Thus a statement by a Department spokesman, read to the House, affirmed that the bill's concern was with "persons . . . engaged in espionage and subversive activities . . . [or] in activities inimical to the best interests of the United States", and declared, "It is not contemplated, should the proposed legislation be enacted into law, *to restrict or to prohibit or in any way to impede the legitimate travel of citizens* . . ." (87 Cong. Rec. 5048, emphasis added.) This precise language was subsequently embraced in the concluding paragraph of the report of the Senate committee reporting on the bill, and was specifically incorporated in the record of the Senate debate. (87 Cong. Rec. 5326; Sen. Rep. No. 444, 77th Cong. 1st Sess.)

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[7] 56 Cong. Rec. 5969-5971, 6029-6032, 6061-6068, 6191-6195, 6235. 6246-6248; H. Rep. No. 485, 65th Cong. 2d Sess., *supra*; Sen. Rep. No. 431, 65th Cong. 2d Sess.

Moreover again, as in the case of the 1918 Act, the debate attending the consideration and passage of the 1941 Act bespeaks repeatedly a Congressional purpose to close the borders to spies and persons deemed dangerous to United States interests.[8] Again nowhere in such debates in their entirety is there any suggestion of purpose to impose or to authorize the issuance of regulations imposing area travel restrictions.[9]

(2) Moreover, the limiting import of the foregoing legislative history is corroborated by the form and casting of the area restrictions undertaken by the Secretary of State during the operative periods of the current and predecessor statutes. There is a consistent history beginning under the predecessor statutes, continuing through the period of Congressional consideration of the present Section 1185 in 1952, and extending long after 1952, of area restrictions cast in civil terms only. Frequently the Department specifically explained its geographical limitations as carrying no criminal sanctions for noncompliance.

(a) Prior to the enactment of Section 1185 on June 27, 1952 the Secretary of State proclaimed area travel restrictions upon five occasions within the periods of the operative effect of the 1918 and 1941 Acts (1918-1921 and 1941-1952).[10] These were:

1. Restriction in 1919 as to Germany (3 Hackworth, Digest of International Law, 530);

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[8]87 Cong. Rec. 5325-5326, 5386, 5048-5053, 5386-5388.

[9]87 Cong. Rec. 5047-5053, 5325-5326, 5385-5389.

[10]The 1918 Act was in effect by Presidential Proclamation only between August 8, 1918 and March 3, 1921. (40 Stat. 1829 and 41, Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and Congressional extensions from

(This footnote is continued on the next page)

2. Restriction in 1950 as to Bulgaria and Hungary (22 Dept. St. Bull. 399);
3. Restriction in 1951 as to Czechoslovakia (24 Dept. St. Bull. 932);
4. Restriction in 1951 as to Hungary (26 Dept. St. Bull. 7);
5. Restriction in 1952 as to East European countries, China and the Soviet Union (26 Dept. St. Bull. 736).

Without exception all of these area restrictions issued during the operative periods of the 1918 and 1941 Acts were cast in civil, safe passage terms only, without suggestion of relevance to the 1918 or 1941 Acts or to criminality.

Moreover, in two of the restrictions the civil-only, non-prohibitory nature of the restrictions was made particularly clear and explicit.

Thus, for example, in the 1919 restriction as to travel to Germany, the Department's announcement indicated plainly that despite the restriction citizen travel to Germany without a passport was *not* prohibited but was merely placed at a traveler's own risk. In its announcement the Department declared that it was "not now issuing or authorizing issuance . . . of passports for Germany" but that it "interposes no objection" to travel there without a passport by any person with "important . . . business", though "such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protec-

November 1941 (55 Stat. 1696) to April 1, 1953 (66 Stat. 54, 57, 96, 137, 330, 333) by which date Section 1185 was already in effect by Presidential Proclamation 3004, January 17, 1953 (67 Stat. C31).

tion which they might expect under normal conditions."[11]

The clearest statement of the non-penal, non-prohibitory character of the Department's area restrictions appears in the 1952 restriction of travel to East European countries, China and the Soviet Union. As heretofore noted that Department declaration, issued May 1, 1952, came immediately prior to the enactment by Congress, June 27, 1952, of Section 1185, and in the very midst of Congressional consideration of that measure. In the May 1, 1952 announcement the Department advised the public it was "stamping all passports not valid for travel" in the specified countries "unless specifically endorsed . . . for such travel." However, declared the official press release, "In making this announcement the Department *emphasized* that this procedure *in no way forbids* American travel to those areas", but amounts merely to a "taking [of] additional steps to warn American citizens of the risks of travel in . . . [such] countries."[12]

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[11]The full text of the restriction reads: "The Department is not now issuing or authorizing issuance or amendment of passports for Germany. However, the Department interposes no objection to the entry into Germany of Americans who have important and urgent business to transact there. In view of the present situation, such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions." (3 Hackworth, *supra*, p. 530.)

[12]The full text of the Department's announcement (Press Release No. 341, 26 Dept. St. Bull. 736) reads as follows:

"The Department of State announced today that it was taking additional steps to warn American citizens of the risk of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel.

"In making this announcement, the Department emphasized that this procedure in no way forbids American travel to

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The 1952 reenactment of statutory language having this history of interpretation and application may be fairly said to carry an explicit purpose not to impose penalties to enforce area restrictions on travel. The Constitutional stature of the right of exit as delineated in *Kent v. Dulles, supra,* would require a specific and articulated intent to impose such restrictions before the inferences drawn from this history could be properly ignored.

(b) The Department's interpretation and application of the predecessor language in the 1918 and 1941 Acts has continued and even been underscored since enactment of Section 1185 to and until the very recent present.

Since the enactment of Section 1185 the Department has announced area travel restrictions upon four occasions. These are:

1. Restriction in 1955 to Albania, Bulgaria, China, North Korea and North Viet Nam (33 Dept. St. Bull. 777);
2. Restriction in 1956 as to Hungary (34 Dept. St. Bull. 247-248);
3. Restriction in 1956 as to Egypt, Israel, Jordan and Syria (35 Dept. St. Bull. 756, 21 Fed. Reg. 8577);

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those areas. It contemplates that American citizens will consult the Department or the Consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

"All new passports will be stamped as follows: 'This passport is not valid for travel to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Roumania or the Union of Soviet Socialist Republics unless specifically endorsed under authority of the Department of State as being valid for such travel.'"

4. Restriction in 1961 as to Cuba, involved at bar (26 Fed. Reg. 482 and 492).

Again, despite the full operative effect at all times of Section 1185 these proclamations unvaryingly have sounded in diplomatic, safe-passage terms only; none was said to have been issued under or be given criminal exit-control sanction by Section 1185.

Thus, for example, the 1956 restriction as to travel to Hungary stated merely that the Department "is unwilling" "either to encourage or facilitate the travel of American citizens to Hungary", and that passports would not be valid for travel thereto unless specially validated. No mention of Section 1185 or of its sanctions is made, despite its full operative effectiveness at the time. (34 Dept. St. Bull. 247, 248.)

Moreover, in two of the area restrictions here concerned, the one concerning Israel, Egypt, Jordan and Syria in 1956 and the restriction concerning Cuba in 1961 involved at bar, the Department expressly recited its promulgative authority only under the non-criminal power of the Act of July 3, 1926 (22 U.S.C. Sec. 211a), *not* under the criminal authority of Section 1185. (21 Fed. Reg. 8577 and 26 Fed. Reg. 482 and 492.)

Additionally, in 1954 the Department by conduct expressly construed the area restriction against travel to Bulgaria and Hungary announced in 1950 as being non-penal and non-prohibitory. The Department in 1954 informed two newsmen desiring to enter Bulgaria that they might travel there without a passport and "use, as a travel document . . . an affidavit in lieu of a passport", and if Bulgaria would permit them entry "the

Department . . . [holds] no objection." (Hearings on Department of State Passport Policy before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess., April 2, 1957, p. 65; hereafter cited as "1957 Senate Hearings".)

(c) Furthermore, it is of particular note and importance that on two occasions the State Department has in express words *conceded* and *declared* that area travel restrictions are civil-passport regulations only, and are not prohibitory in a penal sense. The first occasion is the one already mentioned of the 1952 area restriction as to East European countries, China and the Soviet Union wherein the Department declared it wished to "emphasiz[e]" that its restriction "in no way forbids" travel by American citizens to the affected countries. The Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, which in 1958 completed a survey of passport and travel laws under a grant from the Fund for the Republic, noted this 1952 statement of the Department, and observed, "This appears to have been an honest admission of the lack of statutory power to enforce an area restriction of this nature."[13]

A second and critically important declaration by the Department that its area travel restrictions do not criminally prohibit travel to any affected countries under Section 1185 or otherwise, came in an official Departmental communication to the Senate Foreign Relations Committee in 1957. There the Committee called

[13]Report, "Freedom to Travel" (1958) issued by the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, page 70; hereinafter cited as "Report, 'Freedom to Travel' ".

the Department's attention specifically to its 1952 declaration referred to above that its area restrictions "in no way forbi[d]" affected travel, and asked the Department squarely, "What does it mean when a passport is stamped 'not valid to go to country X'?" Does such procedure, the Committee asked, mean merely that the United States "withdraws its protection" from and "does not approve" such travel, *or* does it mean the United States "prohibits the person from going to country X?" (1957 Senate Hearings, *supra*, p. 56.)

After two months of study, the Department officially replied by a communication to the Committee, July 5, 1957, that a restrictive stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law.*" (*Id.* at p. 59, emphasis added.) The Department said there were criminal laws "which might well be violated *in the course* of such travel", mentioning "e.g. The Trading With The Enemy Act," and, additionally, such travel might lead to the denial of a future passport and might raise questions as to whether "false statements" had been made in obtaining the passport in question. But the mere travel to the area-restricted country *in se* would be *no crime*. No mention or citation was made of Section 1185 as even relevant to the issues posed, despite the thorough canvass of the law.

Surely had the Department in thus communicating its considered views to the Senate committee truly conceived that Section 1185 applied to make criminal a mere leaving of the United States to go to "country X", it would have said so. In the premises its statement, with

its limiting connotations, is eloquent testimony that in truth the Department viewed its area restrictions under law as civil, safe-passage procedures only, not as criminal-sanction measures of exit control.

Moreover, the Department's view of area restrictions as civil measures only is further corroborated by the failure of the Department until the instant case and two recent related cases ever to prosecute any person under Section 1185 or either of its predecessor statutes for violation of any of the Department's many area restrictions established during the operative periods of those statutes. Thus, as related in *United States v. Laub, supra,* 253 F. Supp. 433, 443-444, although Department statistics show that "approximately 600" persons have violated area travel restrictions since the enactment of Section 1185 alone, the Department concedes that the instant prosecution and the prosecutions in *United States v. Laub,* in 1964, and in *Worthy v. United States* (C.A. 5, 1964), 328 F. 2d 386, represent the first attempts by the Department ever to prosecute persons under Section 1185 for claimed violations of area travel restrictions.

(d) Finally, that neither Section 1185 nor any other criminal law applies to give penal effect to area passport restrictions is confirmed by many recent calls upon Congress for legislation to amend Section 1185, or other laws, to provide such very effect, and by Congress' repeated refusal to enact any of such proposals.

Thus in 1957 the report to Congress of the United States Commission on Government Security, established by Public Law 304, 84th Congress, 1st Session (69 Stat. 595) to survey among other areas of law the area of travel and passport legislation, specifically rec-

ommended that, "Title 8, U.S.C.A., section 1185(b), should be amended to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." (Report, p. 475.)

In like vein in 1958 the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York published its Report heretofore described. At page 70 of such Report the Committee pointedly stated its conclusion of the need for area travel criminal legislation. Said the Committee:

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case."

On July 7, 1958, responsive to the Report of the Commission on Government Security above described and to this Court's restrictive decision in *Kent v. Dulles, supra,* President Eisenhower recommended to Congress passage of legislation to provide, among other things, for "clear statutory authority to prevent Americans from using passports to travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States." (104 Cong. Rec. 13062.)

The legislation called for by the President was embodied in bills introduced in 1958 in the 85th Congress, 2d Session, introduced in the Senate as S. 4110, and in

the House as H. R. 13318. Congressman Kenneth B. Keating, in introducing H. R. 13318, declared to the Congress:

> "It . . . specifically authorizes the Secretary of State to designate as out-of-bounds to American passport holders certain areas of the world. Persons who violate the law would be guilty of a misdemeanor and liable to imprisonment for 1 year, or a fine of $1000, or both." (104 Cong. Rec. 13000.)

Neither S. 4110 or H. R. 13318 was enacted into law. They died with the end of the 85th Congress. Congressional failure to act in these respects is not without significance for the issue here. This was failure to act in response to a formal message submitted by the President which particularly requested the imposition of criminal sanctions to enforce area restrictions. This failure came against a background of expressions of Congressional purpose to utilize Section 1185 for ends other than to authorize area restrictions, as well as a consistent pattern of administrative utilization of only the civil function (and not the exit control function) of passports in implementing area restrictions. In these lights, Congress' failure to act suggests a declination to provide the Executive with sanctions it admitted were lacking and without which it had so long prescribed area travel restrictions.[14]

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[14]Moreover, over 30 bills to accomplish, *inter alia*, the same objectives were introduced in the 86th and succeeding Congresses. That the Congress was aware of the lack in existing law of sanctions to enforce area restrictions criminally appears from the remarks of Senator J. William Fulbright, Chairman of the Senate Committee in charge of the legislation. It will be recalled that it was Senator Fulbright's Committee which in 1957 had posed the question of whether travel to "country X" in violation of a Departmental travel restriction would *per se* constitute a crime.

(e) All of the foregoing legislative and administrative history, it is submitted, combines to establish four decisive things as to Section 1185. First, the history shows that Section 1185 was adopted by Congress on representations that it was to serve limited (border control) purposes only and without suggestion of authorization for criminal-sanction area restrictions. Second, the history shows that the Department, in prescribing area restrictions, has uniformly cast them only in terms of the civil passport function of safe passage, and has consistently construed Section 1185 and its predecessors as inapplicable and irrelevant thereto. Third, the history reveals two express declarations by the Depart-

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Senator Fulbright's understanding of the lack of criminal sanctions appears from his description of the relevant portions of his bill (S. 2287, 86th Cong., 1st Sess.):

> "Section 402 makes it unlawful for any citizen . . . voluntarily to travel to any country or area as to which there is in effect, to his knowledge, a declaration made and published by the President under Section 401(b). There is at present no statutory authority to punish travel abroad by passport holders in violation of general geographic restrictions, and this presents a glaring gap in enforcement of our security policies." (Hearings before the Senate Committee on Foreign Relations on Passport Legislation, July 13, 1959, 86th Cong., 1st Sess., p. 18.)

The other bills referred to above include bills providing on pain of criminal punishment that "no citizen shall travel to any country or area" designated as area-restricted by the President such as: H.R. 9069 (86-1) (meaning. 86th Cong., 1st Sess.); S. 2095 (86-1); S. 2287 (86-1); S. 2652 (86-2); H.R. 973 (87-1); H.R. 1086 (87-1); H.R. 2485 (87-1). Bills expressly to amend Section 1185(b) to make criminal "travel to any country in which his passport is declared to be invalid" include: S. 4030 (85-2); H.R. 376 (86-1); H.R. 2232 (86-1); H.R. 2468 (86-1); H.R. 7315 (86-1); S. 1303 (86-1); H.R. 388 (87-1); H.R. 935 (87-1); H.R. 958 (88-1). Bills providing the "travel of all citizens may be [criminally] restrained" with respect to area-restricted countries include: H.R. 5455 (86-1); H.R. 8329 (86-1); H.R. 4077 (87-1); H.R. 2559 (88-1); H.R. 2596 (89-1). Special bills having a like general prohibitory effect as all of the foregoing include: H.R. 5320 (88-1); H.R. 11621 (86-2); H.R. 8293 (89-1).

ment—one to the people and one directly to an agency of the Congress—officially advising that area restrictions do not "forbid" free travel and are not criminal in character. Finally, the history is climaxed and completed by requests of the Congress by the President and the Department that the Congress enact new legislation to make violations of area restrictions criminally punishable—requests which Congress has in all cases declined. All of this establishes a *compelling* record of administrative construction, with congressional acquiescence, that Section 1185 does not authorize issuance under its authority of criminal-sanction administrative area travel prohibitions.

II.

To Enforce the "Excluding Cuba" Regulation Under Section 1185 With Criminal Sanctions in the Premises at Bar Would Violate Due Process for Vagueness, Contradiction and Misleading Terms in the Communication of a Criminal Command.

In light of the many explicit and implicit indications by the Government prior to the instant prosecution that its area travel restrictions represented merely civil, safe-passage measures only, not criminal prohibitions, as related above, and in light of the further circumstance (treated hereafter in detail under Point III *infra*) that the Excluding Cuba Regulation at bar was expressly promulgated not under Section 1185, with criminal sanctions, but only under the Act of July 3, 1926, 22 U.S.C. Sec. 211a, a statute bearing no criminal sanctions, to sustain the conviction below would violate "fundamental fairness" and basic due process requirements forbidding vagueness and misleading and con-

tradictory terms in the communication of a criminal command.

Consider the position of a citizen confronted with the Excluding Cuba Regulation. It, together with Public Notice 179 and Press Relase No. 24, purports to require a passport for travel to Cuba and to simultaneously provide that *all* passports shall be "invalid for Cuban travel "unless specially endorsed"—a condition to be satisfied only in the absolute discretion of the Department. Moreover it expressly declares it is promulgated "under the authority of the . . . act of July 3, 1926," a statute providing no criminal punishment for violation of its terms or of regulations issued under it, not under Section 1185.

Is the Regulation a criminal command or a mere civil, safe-passage measure?

The Regulation itself being unclear, and reciting *only* civil authority for its promulgation, the citizen turns to the general law. He examines there Section 1185. He finds that that statute, as heretofore related, by its terms carries no suggestion of authority for *area prohibitions* upon travel destinations. The terms plainly import that a passport may be either required, or not required, for entries and departures, as regulations may provide, and even that passports may be denied to travelers deemed disqualified for cause, but there is no suggestion from the provisions of the statute that departures *for particular countries* as destinations may be *prohibited* by both requiring and simultaneously denying to all persons a passport therefor.

The citizen next turns to legislative and administrative history. He finds there, as heretofore related, that both under Section 1185 and its two predecessor acts,

the 1918 and 1941 Acts, area passport restrictions appear always to have been formulated and cast as civil, safe-passage procedures only, not as criminal travel prohibitions. Never in the expression of such passport restrictions has the Department even referred to either Section 1185 or its predecessor acts. Instead the citizen finds the Department, as in the German travel restriction in 1919, advising the citizen merely that travel to a restricted area is "upon [a traveler's] own responsibility and at [his] own risk," and further declaring, as in the 1952 restriction, that area restrictions "in no way forbi[d]" affected travel but amount merely to "steps to warn . . . citizens of the risks" thereof. Additionally and to like effect he finds the Department in 1957 formally advising a Senate Committee, inquiring upon the very issue, that if a person travels to an area-restricted country the consequence is "that . . . he cannot be assured of the protection of the United States", but that, as to mere innocent travel *in se* to such destination the travel "does not . . . mean . . . [the traveller] will be violating the criminal law," though if he otherwise transgresses in the *course* of such travel there may be criminal laws he might violate, "e.g., Trading with the Enemy Act."

The significance of the foregoing in terms of due process is that all of these matters of record—addressed to the public by official departmental spokesmen—advise the citizen in substance and in core that area passport travel restrictions are not criminal prohibitions but are civil, safe passage measures only, and that if a person is willing to travel "upon [his] own responsibility and at [his] own risk" his otherwise lawful travel to any affected area will violate no criminal law.

In such premises, now to reverse the Government's position and sustain a conviction as below for a claimed criminal violation of Section 1185 would be, in this Court's words, "to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a [right] which the State clearly had told him was available to him." (*Raley v. Ohio*, 360 U.S. 423, 438; *Cox v. Louisiana*, 379 U.S. 559, 571; *Stevens v. Marks*, 383 U.S. 234, 245.)

The requirement of due process and of "fundamental fairness" (*Scull v. Virginia*, 359 U.S. 344, 353; *Johnson v. United States*, 318 U.S. 189, 197; *Watkins v. United States*, 354 U.S. 178, 214) is that an accused may not be held to answer "for a crime he could not with reasonable certainty know he was committing" (*Scull v. Virginia, supra*). A criminal enactment must be so expressed as to give "fair warning" of what is meant to be prohibited (*Bouie v. City of Columbia*, 378 U.S. 347, 355; *United States v. Cardiff*, 344 U.S. 174, 176; *Raley v. Ohio, supra*, 360 U.S. 423, 438; *Stevens v. Marks, supra*, 383 U.S. 234, 245); citizens must not "be misled" but must be "clearly apprised" of what the law condemns. (*Johnson v. United States, supra*, 318 U.S. 189, 197; *Quinn v. United States*, 349 U.S. 155, 166.) In consequence, criminal commands communicated to citizens in conflicting or contradictory terms, or with misleading effect, necessarily offend due process. (*United States v. Cardiff, supra*, 344 U.S. 174, 176-177; *Scull v. Virginia, supra*, 359 U.S. 344, 353; *Raley v. Ohio, supra*, 360 U.S. 423, 438; *Stevens v. Marks, supra*, 383 U.S. 234, 245; *cf. Johnson v. United States, supra*, 318 U.S. 189, 196-197; *Jones v. United States*, 362 U.S. 257, 263-264.)

It matters not that at bar the command was expressed in part merely by a "regulation". Regulations, in this Court's words, in "practical effect" amount to "little laws" (*United States v. Mersky*, 361 U.S. 431, 437), and when joined with criminal statutes to give criminal penalty must be judged under "the same strict rule of construction" and the same due process prohibitions against vagueness and ambiguity as apply to criminal statutes proper. (*Kraus & Bros. v. United States*, 327 U.S. 614, 621-622; *United States v. Mersky, supra*, 361 U.S. 431, 437.)

Applicable here is the decision in *United States v. Mersky, supra*. There a treasury regulation was ambiguous whether its provisions were intended to implement one or the other of two statutes. If the regulation was meant to implement the first statute, dealing with customs collections, there would be no criminal violation posed by the conduct there in issue, but if the regulation related to the second statute, dealing with frauds upon the public as to the origin of imported goods, there would be posed a criminal violation. This Court declared there that the regulation must be construed under "the rule of strict construction" and that a reading of the regulation "leaves the distinct impression" that it was meant only to implement the customs collection statute, not the statute as to public frauds. Affirming a dismissal of the criminal charge, this Court observed, "If the intent were [to implement the second, not the first statute] it should not have been left to implication. There must be more to support criminal sanctions: [citizens] must not be left to guess the meaning of regulations." (361 U.S. at p. 441.)

In *Kraus & Bros. v. United States, supra,* 327 U.S. 614, the issue was whether a certain regulation issued under the Emergency Price Control Act of World War II prohibited *per se* all "tied-sales" (sales requiring the purchase of a second commodity as a condition for purchasing a price-controlled commodity) in the sale and purchase of poultry, or only tied-sales requiring the purchase of worthless second commodities. The regulation was clear as to coverage of sales within the second, narrower category, but was ambiguous as to blanket coverage of all tied-sales *per se.* Observing that the power of an administrative officer to promulgate regulations bearing criminal sanctions "creates a grave responsibility" whereunder "in a very literal sense the liberties . . . of others may depend upon his definitions and specifications", the Court at page 621 declared that regulations must be made "explicit and unambiguous" to support criminal penalties, and ruled the regulation there inadequate to penalize tied-sales not involving valueless second commodities. The Court said that regulations to support criminal enforcement "must adequately inform those who are subject to their terms what conduct will be considered . . . to bring the penalties . . . into operation", and the "dividing line . . . cannot be left to conjecture." The prohibition intended by the regulation must be "so clearly expressed . . . that the ordinary person can know in advance how to avoid an unlawful course of action." (327 U.S. at pp. 621-622.)

At bar the Cuban travel regulation, read with the public notice and press release issued simultaneously therewith, and read in the light of the legislative and administrative history reviewed above, was at best con-

tradictory and conflicting as to its civil versus penal nature and character, and at worst affirmatively misleading. In either case the conviction cannot Constitutionally stand.

United States v. Cardiff, supra, 344 U.S. 174, demonstrates the Constitution's requirement and command. There a factory inspection statute appeared contradictorily both to require consent to authorize an inspection and to make nonconsent criminally punishable. The Court voided a prosecution thereunder for nonconsent, stating at page 176 that the statute gave no due process "fair warning" because "it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime." The Court concluded, "We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold." (pp. 176-177.)

Even if it be assumed there were at bar some indica at some points of criminal prohibition, at least there is involved, in the words of the *Cardiff* decision, the giving of "conflicting commands." The State is making penal conduct it has many times in the past explicitly and implicitly indicated was only civilly disapproved. Thus the State is punishing in the defendant what the State's prior declarations "on [their] face apparently gave [a citizen] the right to [do]." (344 U.S. at p. 177.)

Also closely in point on the score here concerned is this Court's decision in *Raley v. Ohio, supra,* 360 U.S. 423. There a state investigating commission in effect assured certain witnesses appearing before it that they had available a privilege against self-incrimination and

might rightfully refuse to answer questions. Thereafter, after the witnesses had so refused to answer, the state prosecuted them for criminal contempt, claiming that an applicable state statute gave the witnesses automatic immunity, eliminating in law the privilege to refuse to answer. Upon review this Court voided the convictions there obtained, stating, "After the Commission, speaking for the State, acted as it did", to sustain the contempt judgments would be to sanction "convict-[ion] of a citizen for exercising a privilege which the State had clearly told him was available to him." (pp. 425-426.) To like essential effect and accord are the decisions in *Stevens v. Marks, supra,* 383 U.S. 234, 244-246; *Cox v. Louisiana, supra,* 379 U.S. 559, 571; and *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 79-80.

It can hardly be denied that the defendant acted plausibly and reasonably at bar in reading the Department's Cuban area passport restrictions as bearing no criminal-prohibition sanctions under Section 1185. A like reading of area restrictions and Section 1185 was made by the Special Committee of the Association of the Bar of the City of New York in interpreting the Department's 1952 statement that area restrictions "in no way forbi[d]" affected travel as "an honest admission of the lack of statutory power to enforce an area restriction." The Committee, after long study of all of the travel and passport laws, reported it had "not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission . . ." (Report, "Freedom to Travel", *supra,* p. 70.)

Moreover, in premises parallel to those at bar a District Court judge has but recently read Section 1185 as not making penal travel contravening the Cuban area restriction. In the New York case joined herewith for argument, *United States v. Lamb,* the District judge refused to hold a departure for Cuba (after travel to Paris and Czechoslovakia) without a specially validated passport a violation of Section 1185, declaring "there is a gap in the law" failing to make such conduct penal. (*United States v. Laub, supra,* 253 F. Supp. 433, 460.) In *United States v. Mersky, supra,* as to the ambiguous regulations there which, as at bar, could be read as either penal or nonpenal in the premises concerned, this Court in voiding the conviction noted, "A United States district judge concurred in [the defendants'] reading of the regulation. In the framework of criminal prosecution unclarity alone is enough to resolve the doubts in favor of the defendants." (361 U.S. at p. 441.)

At bar, thus, even after long trial and appellate analysis and briefing it remains *at least* uncertain and debatable whether area passport travel restrictions are criminal and prohibitory in nature or are merely civil, safe passage measures. As this Court stated in *Watkins v. United States, supra,* 354 U.S. 178 at p. 214, "if [a] point is that obscure after trial and appeal," with full legal analysis, then "certainly" it "was not adequately revealed" to the defendant as a layman-citizen at the time before prosecution when she had to read the law and determine its penal or permissive character to determine her conduct. "Fundamental fairness" demands that no citizen "be compelled to make such a determination with so little guidance." [*Id.*] Government "may not substitute" for fair criminal

notice "an intricate scheme" of regulations, statutes, Public Notices, press releases and administrative and legislative history "and thereafter hold in [criminal violation] those who fail fully to perceive its subtleties." (*Stevens v. Marks, supra,* 383 U.S. 234, 246.)

Moreover, even if the defendant at bar "guessed" wrongly as to the nonprohibitory, noncriminal nature of area restrictions, there is lacking at bar the indispensable element of *criminal scienter.* Section 1185 punishes only one who violates its terms "willfully". (Subsection (c).) In both a statutory and a Constitutional sense before a citizen may be validly prosecuted under such Section he must be made to *know* by Government that his act is *criminally prohibited* and not merely civilly disapproved; without such awareness his state of mind lacks the "willfulness" required for criminal prosecution. (*Quinn v. United States, supra,* 349 U.S. 155, 165-167, 170; *Flaxer v. United States, supra,* 358 U.S. 147, 151, 152; *United States v. Murdock,* 290 U.S. 389; *Morissette v. United States,* 342 U.S. 246; *Lambert v. California,* 355 U.S. 225; *Smith v. California,* 361 U.S. 147; *Heikkinen v. United States,* 355 U.S. 273, 279-280.)

Particularly pertinent here on the score of scienter are the *Quinn* and *Flaxer* case, *supra.* In both of those cases witnesses before a Congressional investigating committee raised objections to questions and invoked claims of privileges not to answer, and the committee in each instance failed to make clear whether the objections were accepted, and the committee merely displeased, or whether the objections were rejected and the witnesses criminally *required* to answer. This Court held the offense of contempt "requires a criminal intent

— . . . a deliberate, intentional refusal to answer", and a witness could not in criminal terms be required to "guess" whether his refusal to answer was merely displeasing or whether answer was required as a criminal command. (349 U.S. at pp. 165 and 170; 358 U.S. at p. 151.)

So, too, at bar. Consistent with the requirement of punishable "wilfulness", the defendant at bar could not be required to "guess" whether the Cuban area travel restriction represented only civil governmental disapproval and the withdrawal of the diplomatic sponsorship of safe passage, or constituted a penal prohibition. So long as the crucial distinction between mere displeasure and a criminal command remained an "ambiguity" and was not resolved by Government "with a reasonable degree of certainty" (*Flaxer v. United States, supra,* 358 U.S. at p. 151) the defendant's conduct below could not be "wilful" and punishable in terms of fundamental law.

III.

The "Excluding Cuba" Regulation Was Not Validily Promulgated Under Section 1185.

Even if it be assumed that Section 1185 authorizes the issuance under its criminal sanctions of area travel prohibitions, violation of the Excluding Cuba Regulation can be no crime at bar because that Regulation was not *promulgated* under that criminal authorizing statute, but was *expressly* promulgated *only* under the authority of the Act of July 3, 1926, 22 U.S.C. Sec. 211a, a statute bearing no criminal sanctions for violations of regulations issued under its terms.

The penalty-imposing, criminal-warning portions of Section 1185 (Subsection (c)) provide for punishment only of persons who "wilfully violate any of the provisions" of Section 1185 itself "or . . . of any . . . regulation issued *thereunder*." (Emphasis added.) Section 1185 and the only regulations validly issued *thereunder* (Departmental Order No. 1003, 6 Fed. Reg. 6069, as amended by Departmental Regulation 11, 10 Fed. Reg. 11046,[15] being 22 C.F.R. Sec. 53.1 *et seq.* in the form pre-existing the Excluding Cuba Regulation) do *not* require a passport for travel to Cuba and do *not* purport to impose any area travel prohibition as to Cuba or any other country or area.

It is only the Excluding Cuba Regulation, and Public Notice 179 and Press Release No. 24 issued simultaneously with it, which collectively purport to at once both require passports for travel to Cuba and simultaneously to provide passports shall be invalid for such travel unless specially validated therefor in the discretion of the Secretary of State. But that Regulation, and its accompanying Public Notice and Press Release, were *expressly* issued under the authority *only* of the *civil* Act of July 3, 1926, not under Section 1185.

Thus the promulgative clause of the Excluding Cuba Regulation is clear and specific. The official text of the Regulation (Regulation No. 108.456) appears in Vol-

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[15]Both promulgated, as hereafter noted, *expressly* under the authority of the 1918 and 1941 Acts predecessor to Section 1185, and incorporated under Section 1185 *expressly* by Presidential Proclamation No. 3004, 67 Stat. C31.

ume 26 of the Federal Register at pages 482-483. The promulgating clause (excerpted for emphasis) reads *specifically:*

> "Pursuant to the authority vested in me . . . under the authority of . . . the act of . . . July 3, 1926, . . . I hereby amend paragraph (b) [of 22 C.F.R. 53.3] as follows. . . ."[16]

The criminal-sanction authority of Section 1185 is *not* invoked. The *civil* Act of July 3, 1926 merely grants the Secretary civil discretion to "grant and issue" passports and does not purport to provide criminal punishment for violation of any regulation issued under its terms.

Thus the Excluding Cuba Regulation *upon its face* and *by its very terms* is promulgated not under the criminal-penalty authority of Section 1185[17] but only under the authority of the Act of July 3, 1926, a civil act providing no criminal sanctions for violation of regulations issued under its authority.

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[16]The promulgative clause also invokes the authority of the Act of May 26, 1949, 63 Stat. 111, 5 U.S.C. Sec. 151c, the general rule-making statute affecting the Secretary of State; that Act is likewise a civil statute providing no criminal punishment for violations of regulations issued under it, and being more general than the Act of July 3, 1926, adds nothing thereto for the purposes here concerned.

[17]It is true that inserted (in parenthesis) between paragraphs of the Regulation as printed in the Federal Register there is a reference to Section 1185 which is clearly not a part of the promulgative clause or of the text of the Regulation itself. This indication of awareness of Section 1185 while not including it in the promulgative clause, seems to manifest a conscious intent not to invoke it as promulgative authority. Additionally, as the Regulation appeared in the Code of Federal Regulations pocket supplement at the time of the adoption of the Regulation, the promulgative clause, in accordance with usual policy, was omitted while the parenthetical reference to Section 1185 was kept. The editorial work of the C.F.R. codifiers can neither add to or subtract from the legal authority of the Regulation as already issued.

Moreover that the Excluding Cuba Regulation was promulgated only under the civil Act of July 3, 1926 is confirmed and heightened by the circumstance that Public Notice 179 (26 Fed. Reg. 492), issued simultaneously with the Regulation and for the very purpose of communicating the same to the public, repeats the promulgative language of the Regulation and again invokes *only* the civil promulgative authority of the Act of July 3, 1926, making no reference whatever to Section 1185 or any other penal promulgative authority, or to any possible penal sanctions. Public Notice 179 (excerpted for emphasis) merely recites:

> "Therefore, pursuant to the authority of . . . the Act . . . of July 3, 1926 . . . all United States passports are hereby declared to be invalid for travel to or in Cuba . . ." (26 Fed. Reg. 492.)

Additionally, that the Excluding Cuba Regulation was issued only under the civil sanctions of the Act of July 3, 1926, and not under the criminal sanctions or authority of Section 1185, is underlined and made even more plain by a comparison of its promulgative clause with the promulgative clauses of the original regulations under Section 1185 (constituting 22 C.F.R. Secs. 53.1 *et seq.* in the form pre-existing the Excluding Cuba Regulation). The original regulation issued under the 1941 Act as Departmental Order No. 1003, November 28, 1941, 6 Fed. Reg. 6069, exempted citizens from requirement of a passport as to travel to Canada, Mexico and "the islands of the West Indies" and certain other islands, but required passports for all other travel. This regulation was promulgated *expressly* "under authority of the act of . . . May 22, 1918 . . . as amended by the act of . . . June 21, 1941." (6 Fed. Reg.

6069.) This regulation was amended August 29, 1945, by Departmental Regulation 11, 10 Fed. Reg. 11046, to extend the exemption of citizens from requirement of a passport as to travel to "any country or territory in North, Central or South America, or in any island adjacent thereto." *Again* the amended regulation was promulgated *expressly* "under authority . . . of the act of . . . May 22, 1918 . . . as amended by the act of . . . June 21, 1941." (10 Fed. Reg. 11046.)

Moreover, when the above described original regulations, issued thus expressly under the 1918 and 1941 Acts, were adopted under Section 1185 after its enactment in 1952 by the President on January 17, 1953, in Proclamation No. 3004, 67 Stat. C31, the President in declaring the said prior regulation should be adopted as regulations under Section 1185 *expressly* recited that he was "acting under . . . the authority vested in me by section 215 of the Immigration and Nationality Act [*i.e.*, Section 1185]." (67 Stat. C31, C32.)

Thus the contrast is *complete*. The original regulations, on each occasion of enactment, were carefully promulgated under the criminal-sanction authority of the 1918 and 1941 Acts predecessor to Section 1185, and on the enactment of Section 1185 the said regulations were specifically adopted as regulations under Section 1185 by a presidential proclamation carefully reciting the criminal authority of Section 1185. The Excluding Cuba Regulation was not similarly issued but was issued and promulgated expressly only under the civil sections and authority of the Act of July 3, 1926.

In consequence a violation of the Excluding Cuba Regulation can be no crime. Section 1185(c) makes criminal only a violation of its own terms or of "any

. . . regulation issued *thereunder.*" The Excluding Cuba Regulation *by its terms* was *not* "issued *thereunder*" but only "under the authority of . . . the act of . . . July 3, 1926." Hence there is no conjunction of statute and regulation to create any criminal command, or to express any declaration or fair warning thereof.

It is basic in Federal criminal law that criminal commands must be strictly construed and must be confined to only that which is clearly expressed. (*United States v. Weitzel,* 246 U.S. 533, 543; *McBoyle v. United States,* 283 U.S. 25, 27; *United States v. Resnick,* 299 U.S. 207, 210; *Todd v. United States,* 158 U.S. 278, 282; *United States v. Harris,* 177 U.S. 305, 309.) And this rule applies as well to criminal regulations as to criminal statutes proper. (*United States v. Mersky,* 361 U.S. 431, 440; *Kraus & Bros. v. United States,* 327 U.S. 614, 622.) This Court has said in *United States v. Mersky* (*supra,* p. 440), "In the context of criminal prosecution, we must apply the rule of strict construction when interpreting [a criminal] regulation and statute. *United States v. Halseth,* 342 U.S. 277, 280 (1952); *United States v. Wiltberger,* 5 Wheat, 76, 95-96 (1820)."

A regulation has no force or operation as "law" except as it may be granted such force by an authorizing statute. (*Williamson v. United States,* 207 U.S. 425, 453 *et seq.; United States v. Standard Brewery,* 251 U.S. 210, 220; *United States v. United Verde Copper Co.,* 196 U.S. 207, 215-216.) And, "Much more does this principle apply to a case where it is sought . . . to prescribe a criminal offense by the regulation of a department. . . . It is necessary that a sufficient statutory authority should exist for declaring any act or omission

a criminal offense . . ." (*United States v. Eaton,* 144 U.S. 677, 687-688.) There are, in Federal criminal law, "no common law offenses" (*United States v. Eaton, supra,* at p. 687), and no "constructive offenses." (*Todd v. United States, supra,* 158 U.S. 278, 282; *United States v. Resnick, supra,* 299 U.S. 207, 210.) Criminality can exist "only for . . . an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress" (*Viereck v. United States,* 318 U.S. 236, 241), and "[w]here the charge [as to a regulation] is of crime, it must have clear legislative basis." (*United States v. George,* 228 U.S. 14, 22.)

The Excluding Cuba Regulation at bar does not evidence, in fact it *negates,* any "clear legislative basis" for a claim of "crime". It recites *expressly* civil promulgation *only.* Yet, in this Court's words, when a regulation is contended by Government to express or define a crime, "Congress has warned the public to look to that source alone [i.e., to the regulation] to discover what conduct . . . [will] create criminal liability." (*Kraus & Bros. v. United States, supra,* 327 U.S. 614, 622.) The fact that a regulation and a statute have been united to create a criminal offense may not be "left to implication" (*United States v. Mersky, supra,* 361 U.S. 431, 441) or to "conjecture". (*Kraus & Bros. v. United States, supra,* 327 U.S. 614, 621.)

The issue involved is a question of *authorizing power* and of *fair warning.* The authority of administrative officers to enact regulations with the force of criminal sanctions must be grounded in an *authorizing statute;* it is an awesome power, involving "grave responsibility" (*Kraus & Bros. v. United States, supra,* 327 U.S. 614,

621), and is strictly circumscribed. Accordingly, even to amend originally criminal regulations so that the amendment or change will also bear criminal force, the amendment must itself be duly issued under the authorization and authority of a statute providing criminal penalty for violation of regulations issued under it. The Act of July 3, 1926, under the authority of which *alone* the Excluding Cuba Regulation was expressly issued, possesses and transmits no such authorizing power. Hence violation of that regulation can be no crime.

Moreover, by reciting *civil* authority only in its express declaration of its promulgative base, the Excluding Cuba Regulation denies fair warning and, indeed, is affirmatively misleading to the public to whom it was addressed as to any claim now by the Government of criminal promulgative authority under Section 1185. A criminal statute warns by its terms of criminal penalty; the Excluding Cuba Regulation does not warn but affirmatively misleads. At bar a citizen could surely read the promulgative clauses of the Excluding Cuba Regulation and of Public Notice 179, issued to publish and communicate the Regulation, and reasonably infer from the express invoking of the authority of the Act of July 3, 1926 and the *absence* of any reference to any authority deriving from Section 1185, that the Regulation was not issued under sanction of Section 1185 and hence that violation would not and could not be chargeable as a crime under said Section. To retroactively announce otherwise, and with criminal penalty, denies all principles of fair warning and notice. Applicable here, therefore, are all of the authorities discussed under Point II above prohibiting ambiguity, contradiction and misleading terms in the communication of a criminal command.

Both for *actual* failure, then, of promulgation under the criminal-sanctions authority of Section 1185, and for failure to make such authority and promulgation reasonably *appear*, the Excluding Cuba Regulation at bar cannot be enforced as a crime.

IV.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Unconstitutionally Delegates Legislative Power Without Adequate or Any Standards.

If Section 1185 be construed to grant authority to impose under its criminal-exit sanctions area travel prohibitions such as the Excluding Cuba Regulation at bar it then offends the Constitutional fundamental prohibiting delegation of legislative power without reasonable and sufficient standards.

Article I, Section 1 of the Constitution vests in Congress "All legislative powers herein granted" and under this *exclusive* grant it "is a principle universally recognized as vital to the integrity and maintenance of [our] system of government" (*Field v. Clark*, 143 U.S. 649, 692) that Congress may not "abdicate, or . . . transfer to others, the essential legislative functions with which it is thus vested." (*Panama Refining Co. v. Ryan*, 293 U.S. 388, 421; *Schechter Corp. v. United States*, 295 U.S. 495, 529.)

Zemel v. Rusk, supra, 381 U.S. 1, upheld area travel restrictions against the charge of invalid delegation of legislative power only so far as the *civil* side of the law affecting passports is concerned, judging such restrictions only as diplomatic, safe-passage measures authorized under the Act of July 3, 1926, 22 U.S.C. Sec.

211a, a *civil-authorization* statute without criminal sanctions. At bar if area restrictions are to be sustained as authorized by Section 1185, with criminal enforcement sanctions, the authority delegated must be judged as a matter of delegated *criminal* powers. As this Court has noted, the two landmark delegation decisions, *Panama Refining Co. v. Ryan, supra,* and *Schechter Corp. v. United States, supra,* were "both . . . cases deal[ing] with delegation of . . . powers to make federal crimes of acts that never had been such before", and "a discretion to make regulations to guide [civil] action" may well be "constitutionally permissible" where in the same premises "it might not be allowable to authorize creation of new crimes in unchartered fields." (*Fahey v. Mallonee,* 332 U.S. 245, 249-250.) The point is "the power of punishment is vested [exclusively] in the legislative . . . department" of Government. "It is the legislature . . . [alone] which is to define a crime, and ordain its punishment." This is the "found[ation]" of the rule of strict construction of all criminal laws. (*United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 93.) Accordingly, *Zemel* does not control here.

Moreover, *Zemel* upheld the area travel restriction on Cuban travel under the civil Act of July 3, 1926 upon the sole basis of a premise not operative here. The foundational premise of *Zemel* was that while the Act of July 3, 1926 expressed no delegation standard within its terms, there existed a "consistent" history of prior administrative practice sustaining civil area restrictions under prior statutes of which the 1926 Act was a reenactment, and hence Congress for civil purposes might be deemed to have adopted such prior practice as a sufficient standard for the discretion delegated

under the 1926 Act. The Court ruled expressly that "the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.' . . . So limited, the Act does not constitute an invalid delegation." (381 U.S. at pp. 17-18.)

Even could such an informal premise of adoption of prior administrative practice operate to afford sufficient legislative standards for a *criminal* statute, the premise in any event has no application in fact to the delegation of administrative powers under Section 1185 at bar. As heretofore seen the administrative practice as to the issuance of area restrictions under the operative periods of the 1918 and 1941 criminal Acts of which Section 1185 is a reenactment so far from showing a "consistent", or any, practice of issuance of area restrictions thereunder, demonstrates affirmatively a clear administrative practice *to the contrary.* As heretofore seen, all area restrictions issued during the period of the criminal 1918 and 1941 Acts were unvaryingly formulated and cast as civil, safe passage measures only, without reference or conceived relevance to the criminal sanctions of the 1918 and 1941 Acts, and were cast in the Department's words to "in no way forbi[d]" affected travel.

Thus the prior administrative practice preceding the reenactment by Section 1185 of *its* predecessor statutes, the 1918 and 1941 *criminal* Acts, proves not the prior reasonable exertion of criminal area-restriction powers but a *denial* and *disclaimer* thereof. Such a *negating* record clearly can afford no administrative base for supplying affirmative discretionary standards capable

of adoption by Congress in the enactment of Section 1185.

As this Court emphasized in *Kent v. Dulles, supra,* 357 U.S. 116, 129, "control over exit" requires an exercise of "the law-making functions of the Congress" and affects "activities or enjoyment, natural and often necessary to the well-being of an American citizen", and in consequence this Court "will construe narrowly all delegated powers" affecting exit. Section 1185 affects the right of exit *directly,* as the Act of July 3, 1926 involved in *Zemel* did *not,* and Section 1185 operates by *criminal command.* Hence the scrutiny of the standards for delegated legislative powers under Section 1185 must be judged with "the tenderness of the law for the rights of individuals" required as to either the exercise or delegation of criminal powers. (*United States v. Wiltberger, supra,* 18 U.S. 76, 93; *Fahey v. Mallonee, supra,* 332 U.S. 245, 249-250.)

The fundamental requirement of the Constitution as to delegation of legislative powers, and particularly criminal legislative powers, is that Congress "itself" must erect "the standards of legal obligation". (*Schechter Corp. v. United States, supra,* 295 U.S. 495, 530.) Congress must provide "an intelligible principle" to guide administrative regulations (*Hampton & Co. v. United States,* 276 U.S. 394, 409; *Panama Refining Co. v. Ryan, supra,* 293 U.S. 388, 430), and must "legislate . . . as far as [is] reasonably practicable." (*Buttfield v. Stranahan,* 192 U.S. 470, 496.)

It cannot be suggested that these minimal requirements have been satisfied at bar. Section 1185 creates *no* standard and *no* "intelligible principle" to guide administrative regulations issuable under its terms. It sim-

ply authorizes "such limitations and exceptions" to its terms "as the President may authorize and prescribe", and thus leaves the executive branch without standards whatever. *No* standards cannot by definition be sufficient or adequate standards. And it cannot be said Congress has legislated "as far as [is] reasonably practicable" for if area restrictions were conceived desired at least a basic declaration affirming this and fixing minimum policy guides therefor could readily have been expressed.

V.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Deprives Defendant of Personal Liberty and of Freedom of Speech, Thought and Association, Contrary to the First and Fifth Amendments.

The liberty of individual citizens to travel freely to all parts of our world is, in this Court's words in *Kent v. Dulles,* "basic in our scheme of values"; it is "a part of our heritage." (357 U.S. at p. 126.) It is a right which "was emerging at least as early as the Magna Carta" (*id.,* at p. 125; Article 42, Magna Carta) and it was recognized by Blackstone. (1 Blackstone Commentaries, 134-135.) It is "deeply engrained in our history" and "may be necessary for a livelihood . . . [or] as close to the heart of the individual as the choice of what he eats, or wears, or reads." (357 U.S. at p. 126.)

Liberty of travel, moreover, is a freedom "closely related to rights of free speech and association." (*Aptheker v. Secretary of State,* 378 U.S. 500, 517.) The Universal Declaration of Human Rights relates it to the need of the people "to seek, receive and impart information and ideas . . . regardless of frontiers." (Articles

19 and 13(2).) Liberty of speech protects "freedom of inquiry" and "includes . . . the right to receive" information and ideas as well as to express such (*Griswold v. Connecticut,* 381 U.S. 479, 482; *Lamont v. Postmaster General,* 381 U.S. 301, 305), and in Chafee's words, approved in *Kent* (357 U.S. at pp. 126-127), "travel abroad enables American citizens . . . to be well-informed on public issues" and thereby "contributes to sounder [democratic] decisions."

As Chafee puts it further,

> "An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our Government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home."
>
> Chafee, Three Human Rights in the Constitution of 1787 (1956), pages 195-196.

Defendant's conduct at bar in connection with her travels to Cuba parallels precisely the democratic thesis expressed thus by Chafee. Not wishing to be "obliged to form [her] opinions about our foreign policy" as to Cuba solely by what she might be "told by officials of our government or by a few correspondents of American newspapers", she travelled there to see the land for herself. Moreover, as Chafee predicted, she found her "views on domestic questions" too were "enriched by seeing how [others] are trying to solve similar problems." In the words of the Stipulation of Facts at bar,

defendant travelled about Cuba observing "the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health", and took pictures of what she saw. [R. 52.] When she returned she "appeared before various groups and gatherings of her fellow citizens" and told them of her experiences and observations. [*Id.*] Thus did she as one citizen attempt to "contribute to sounder decisions at home." She acted merely as one citizen-participant in the nation's "freedom of discussion", which, in this Court's words, "if it would fulfill its historic function . . . must embrace all issues about which information is needed or appropriate to enable the members of our society to cope with the exigencies of their period." (*Thornhill v. Alabama,* 310 U.S. 88, 102; *Wood v. Georgia,* 370 U.S. 375, 388.)

As respects the subject of Cuba, the informed will of the American people bears upon questions of life and death, not only for themselves but for the planet as a whole. In such a context to say that the American people may know about Cuba only what appears in official declarations of policy is a travesty on the democratic process. Indeed to say that they may know only what is reported by those newsmen and businessmen whose travel to Cuba the proponents of official policy may approve is to offer sources of information only slightly less restricted.

It is no answer to the needs of the American people for information on matters so grave to say that they pertain to foreign relations and that policy in these matters may be determined by appointed officials. For this is to give officialdom the means of perpetuating itself

and insulating its policies from public debate. At all events the people through their representatives are entitled to vote on questions of war and peace and certainly to petition their government concerning matters of foreign relations. The criminal proscription on travel invoked at bar substantially burdens and clogs the processes whereby our citizens can determine their own positions and exert informed pressure upon their representatives at the seat of government. So doing such prohibition violates the root premises of the First Amendment and of self government.

It is true this Court in *Zemel v. Rusk, supra,* 381 U.S. 1, ruled the Department of State has Constitutional power to refuse to issue a passport valid for travel to Cuba under the civil safe-passage side of the passport powers. But involved at bar is a criminal prohibition, not a civil withdrawal of a protective privilege.

It is one thing to say that Government may determine to withdraw from specificied parts of the world for reasons of foreign and diplomatic policy the privilege of the diplomatic safe-passage protection afforded by passports, and may require citizens if they travel to such areas to proceed on their individual responsibility only. It is another thing entirely to say that Government may outright prohibit *any* free travel to administratively-listed areas of the globe on pain of criminal punishment even as to the citizens willing to travel without diplomatic passport protection. It is the latter which is involved here. That issue was expressly reserved in *Zemel v. Rusk,* and this Court should now affirm that under the First and Fifth Amendments the Government may not prohibit and punish such free, innocent travel. That power, and especially in time of

peace as at bar, is inconsistent with the protected liberty of citizens in a self-governing nation.

Moreover, there is a feature of *censorial, discretionary power* in the restriction upon travel to Cuba at bar which is particularly offensive to personal liberty and to freedom of speech, thought and association. The Excluding Cuba Regulation, read with Public Notice 179 and Press Release No. 24 issued simultaneously with it, does not simply and totally prohibit all travel to Cuba. Instead it prohibits such travel subject to *censorial* discretion. Public Notice 179 (Appendix D; 26 Fed. Reg. 492) provides passports shall be "invalid for travel to or in Cuba" "unless specially endorsed for such travel under the authority of the Secretary of State", and Press Release No. 24 (Appendix E; 44 Dept. St. Bull. 178) provides that "exceptions" allowing travel to Cuba will be permitted *only* "to persons whose travel may be regarded as being *in the best interests of the United States* . . ." (Emphasis added.)

Thus the regulatory ban considered in entirety vests the Secretary with "completely uncontrolled discretion" (*Cox v. Louisiana,* 379 U.S. 536, 557) to allow or disallow travel to Cuba at his arbitrary license. He has power, in this area of sensitive First-Amendment-connected liberty, "to act as a censor", and, as well, to jeopardize "the right of [applicants for such travel] not to be denied equal protection of the laws." (*Id.*, at p. 557.) "It is clearly unconstitutional to enable a public official . . . to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary licensing power" over First Amendment area rights. (*Id.* at p. 557; *Thornhill v. Alabama, supra,* 310 U.S. 88, 97;

Kunz v. New York, 340 U.S. 290, 294; *Saia v. New York,* 334 U.S. 558, 560-561; *Niemotko v. Maryland,* 340 U.S. 268, 271-272; *Cantwell v. Connecticut,* 310 U.S. 296, 305-307; *Largent v. Texas,* 318 U.S. 418, 422.)

As stated by Commager,

> "If the right to travel abroad is to depend on the subjective judgment of some subordinate in the State Department as to whose travel is 'in the best interests of the United States', there is an end—in theory, at least—to freedom of travel. Who determines what are the interests of the United States? Who determines whether a particular passport applicant meets these murky criteria? If everyone who expects to travel must so comport himself as to satisfy the notions of Federal bureaucracy about political ideas, associations, and activities, control over travel may well become a powerful instrument for Federal control of thought."
>
> Henry Steele Commager, as quoted in Hearings Before The Senate Committee on Foreign Relations On Passport Legislation, July 16, 1958, 85th Cong., 2d Sess., p. 184.

The power to censor travel, then, as one of the channels of information affecting public opinion, is tantamount to improper administrative influence over the free molding of public sentiment. In Chafee's words, such arbitrary, licensing power over the right of travel is to be condemned as "one of the worst evils of suppression of freedom of the press" because "[i]t enables government officials to pursue their own policies by keeping the public from learning facts and ideas

which may throw doubt on the soundness of those policies." (Chafee, *supra*, at p. 196.)

A statute creating arbitrary, censorial licensing power over First-Amendment-related liberties, as does the regulatory ban on travel to Cuba at bar, is void upon its face and may be attacked by any citizen "whether or not he applied for a license." (*Freedman v. Maryland*, 380 U.S. 51, 56; *Staub v. City of Baxley*, 355 U.S. 313, 319.) "The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat [of such censure]." In consequence, "[o]ne who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." (*Thornhill v. Alabama*, *supra*, 310 U.S. 88, 97.)

VI.

No Sufficient Presidential Proclamations of Emergency Exist to Support the "Excluding Cuba" Regulation Under Section 1185 at Bar.

Section 1185 by its terms applies during peace time only (1) "during the existence of any national emergency proclaimed by the President", and then only if (2) the President finds and further proclaims "that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon" entries and departures.

It is the contention of the Government that these proclamation requirements have been satisfied by Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, attached hereto as Appendix F, and by Pres-

idential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, attached hereto as Appendix G, which is referred to and adopted in Proclamation No. 3004.

Defendant submits the statutory requirements have not been satisfied.

(1) Firstly, Proclamation No. 3004 makes no proclamation of apprehended need for *geographical* area travel restrictions. Section 1185, in addition to the proclamation of a general "emergency", requires as a condition for any entry or departure restrictions under its criminal sanction that the President find and proclaim "that the interests of the United States require" that "restrictions and prohibitions" upon entries and departures "in addition to those provided otherwise than by this section" be imposed. Since civil restrictions upon area-restricted travel (withdrawal of the safe-passage protections of a passport) clearly exist independent of Section 1185, the requirement of the statute is that before its criminal sanctions may be added the President must first find and proclaim a necessity therefor. What is required is a *specific* finding and proclamation of necessity for *area* or *geographical* restrictions. Proclamation No. 3004 merely finds generally, and in blanket terms, that United States interests require exit and entry restrictions additional to those otherwise existing, but there is no finding of necessity for *geographical* restrictions affecting a traveller's destination.

Section 1185 is a criminal statute and must be narrowly construed, and its precondition that departure restrictions must be found to be "required" must be liberally interpreted in favor of the accused. This means,

it is believed, that as to all restrictions and prohibitions imposed under the statute the President must specifically find that the same, either individually or as a category, are "required" by "the interests of the United States." Applied to the imposing of area destination restrictions—a category of restrictions unique unto itself and one requiring a different basis of justification than restrictions applicable to individuals—the statute requires a *specific* finding of need for such regulations, either individually or at least as a class. Proclamation No. 3004 expresses no such finding under any view, and in consequence, for failure of one of its preconditions, Section 1185 cannot be applied at bar to enforce an area travel restriction such as the Excluding Cuba Regulation.

(2) In any event, no valid, enduring national emergency is shown at bar under Proclamations Nos. 3004 and 2914 sufficient to satisfy the requirements of Section 1185. Proclamation No. 3004, issued January 17, 1953, merely proclaims "the national emergency the existence of which was proclaimed . . . by Proclamation 2914 still exists." Proclamation No. 2914, issued December 16, 1950, in turn proclaimed "a national emergency" bottomed on the Korean War then obtaining; its base premise is now removed and the condition of emergency it declared no longer exists.

The opening and controlling recital of Proclamation No. 2914 reads:

> "WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; . . ."

While there is general reference thereafter in the Proclamation to "world conquest by Communist imperialism" and to the importance of protecting the basic liberties of American life, it is plain that Proclamation No. 2914, issued December 16, 1950, is bottomed upon the Korean War. Proclamation No. 3004, issued January 17, 1953, merely reiterates by recital the "national emergency . . . proclaimed . . . by Proclamation 2914."

Whatever may have been the situation in 1950 and 1953, clearly that situation does not exist today. The Korean War, which was the explicit occasion and basis for "the national emergency" proclaimed in Proclamations Nos. 2914 and 3004, ended July 27, 1953. (13 Encyc. Brit. 467, 474.) There is, therefore, no rational basis for the interference with the basic right of travel today upon the basis an emergency no longer in existence.

This Court is not controlled by an outdated executive proclamation of an emergency which by passage of time has ceased to exist.[18] The Court has independent right, and even duty, to inquire whether there is in fact today such a national emergency as was proclaimed in 1950 and 1953 by Proclamations Nos. 2914 and 3004 sufficient to justify the criminal restriction upon free travel in contest at bar. As stated by Mr.

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[18]As stated, Proclamations Nos. 2914 and 3004 arose out of and spoke to the Korean situation which our government characterized as unprovoked aggressive warfare. Eight years later, in 1961, the Cuban situation bore no resemblance to that in the Korean crisis. There had been, simply, a change of government in Cuba, and its economic policies came into conflict with our interests. There was no war and no threat of war. Cuba had merely selected a politico-economic system with which we disagreed.

Justice Holmes in *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 547-548 (quoted and approved subsequently in *Baker v. Carr,* 369 U.S. 186, 214):

> ". . . [A] court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously, so far as this declaration looks to the future, it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when past. . . . In our opinion it is open [to a court] to inquire whether the exigency still existed upon which the continued operation of the law depended." (264 U.S. at pp. 547-548.)

Lacking at bar are the care and frequency with which the legislature in *East New York Savings Bank v. Hahn,* 326 U.S. 230, 234-235, reviewed the law there concerned from time to time, and adjusted its terms, based in each case on a full investigation of the facts—displaying thereby "the empiric process of legislation at its fairest." Governmental powers grounded upon war emergency may not be "indefinitely prolonged merely by keeping alive a state of war that ha[s] in fact ended." (*Woods v. Miller,* 333 U.S. 138, 147, Mr. Justice Jackson concurring.)

The lapse of time since the issuance of the proclamations here, together with the judicially noticeable matters set out in this branch of the argument, render the proclamations presumptively inoperative. Surely the changing kaleidoscopes of international relations and

political maneuvers are not the sort of fact situations entitled to any presumption of continuance. Indeed, just the opposite of such a presumption would seem required. (See, *e.g. Maggio v. Zeitz,* 333 U.S. 56; *Colt v. United States* (C.A. 5, 1946), 158 F. 2d 641; *United States v. Patterson* (C.A. 2, 1955), 219 F. 2d 659.))

VII.

Defendant Departed Not for Cuba but for Mexico, and Without Even Prior Request for Permission to Enter Cuba; Properly Construed and Constitutionally Limited, Section 1185 Does Not Reach Such a Departure.

When defendant departed the United States on the dates charged in the indictment she went to Mexico, not to Cuba. Only *after* her United States departure, and *after* her arrival in Mexico in each instance, did she apply for and ultimately secure Cuban permission to enter Cuba. Accordingly, at the time of each of her "departures" from the United States she had no *ability* to, and she did not, "depart" without a passport from the United States "*for* the Republic of Cuba" "a place outside the United States for which a valid passport is required" [Indictment; R. 1-2, emphasis added] within the meaning of Section 1185.

The facts dealing with defendant's departures on each of the dates charged in the indictment, January 22 and August 18, 1962, are set forth in paragraphs 4 and 7 of the Stipulation of Facts [R. 50-51]. On each occasion she crossed the United States border into Mexico, without need for any passport, travelling on the first occasion by airplane and on the second, by automobile. In each instance "at the time she departed" she "did not have Cuba's permission to enter

Cuba" and she "intended to seek permission . . . to visit Cuba" from representatives of Cuba "in Mexico". Thus when she departed the United States she had no power to go to, or leave "for", Cuba. She intended to seek permission to enter Cuba only *after* arrival in Mexico, and she in fact did so apply and obtained Cuba's permission to visit Cuba on the first occasion four days after her departure from the United States. and on the second occasion, twelve days after she departed the United States.

Section 1185 covers only *dpearture*; it operates only on the facts existing at the moment of such departure. Properly construed and Constitutionally limited, it cannot apply to the facts at bar. To say that departure can be rendered penal by a *subsequent* seeking and obtaining of permission to enter Cuba is to defy reason and to make the statute arbitrary and void in its application under due process fundamentals.

The facts are plain that on each occasion when the defendant left the United States, Cuba was not a country which had agreed to receive her as a visitor or traveller. For there to be a departure from the United States "for" a country, it must be a leaving for a country which is ready to receive the individual concerned. (*Heikkinen v. United States,* 355 U.S. 273, 276.) One cannot depart the country for passport purposes at large so to speak or abstractly; one cannot obtain a passport to travel nowhere. One could sail out on the high seas far beyond the territorial limits and need no passport. He needs a passport when he departs for *another country.* He cannot depart to enter such a country unless that country is ready to receive him.

Thus at the time of her departure the defendant had neither the apparent nor the actual ability to go to

Cuba. Whether such ability would ever come into being was unknown and completely beyond her power. It was not, therefore, within her power to commit the offense charged. See *United States v. Moses* (C.A. 2, 1953), 205 F. 2d 358 and *Liverman v. United States* (C.A. 4, 1958), 260 F. 2d 284. Both of these cases dealt with the offense of possessing an unregistered still. In each case the still had been installed but was not operable because of the need for repairs and adjustments. Since the offense consisted of possessing an operable still, judgments of conviction were reversed. In the case at bar defendant's conduct fell far short of that in the cited cases. Whatever her state of mind when she left the United States, the defendant was unable factually and legally to go to Cuba until she obtained that country's consent for her entry. She did not have that consent when she left the United States borders, and she did not even apply for it until after she got to Mexico City. There is nothing to show that she had even an assurance that such consent would be obtained when she applied. The consummation of her preparations rested upon facts and volition utterly independent of her conduct or will.

Thus the facts here fall short even of attempt. *Cf. Lemke v. United States* (C.A. 9, 1954), 211 F. 2d 73, cert. den. 347 U.S. 1013; *United States v. Coplon* (C.A. 2, 1950), 185 F. 2d 629. In those cases the defendant had engaged in conduct falling just short of the completion of the crime when his conduct was interrupted by police officers who sought to frustrate the defendant's criminal purpose. In each case, preparations were extensive and the defendant's criminal purpose could have been accomplished by his own volition and conduct but for the intervention of others.

Such is not the situation here where defendant's preparations could not bring her even close to consummating entry into Cuba, for that turned upon action of the Cuban Government utterly independent of her power and will.

The inapplicability of the statute at bar to a departure such as the defendant's can be well illustrated by asking that would happen under the statute as the Government construes it if the defendant on arrival in Mexico and on requesting Cuban entry permission had been refused such permission, or, in Mexico, had requested and obtained permission to enter Cuba but because of other circumstances did not in fact travel there. By the Government's thesis the offense would nonetheless be complete because complete at the moment of departing, regardless of whether travel to Cuba should actually eventuate or not.

The Government's interpretation is unreasonable and arbitrary. The statute should be limited and construed not to apply to departures as at bar where at the time of departure there does not exist *ability* to enter (by existing permission) the country travel to which requires a passport not possessed.

Conclusion.

Wherefore, upon all of these reasons and considerations set forth above, the judgment of conviction below should be reversed.

Respectfully submitted,

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APPENDIX A.

Section 1185 of Title 8 of the United States Code enacted as Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, reads in material part as follows:

Travel Control of Citizens and Aliens During War or National Emergency—Restrictions and Prohibitions on Aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * *

Citizens

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; * * *.

APPENDIX B.

The "Excluding Cuba" Regulation, January 16, 1961, Dept. Reg. No. 108.456, 26 Fed. Reg. 482 (amending 22 C. F. R. Sec. 53.3 which follows immediately as Appendix C), reads in full as follows:

Dept. Reg. 108.456.

PART 53 — TRAVEL CONTROL OF CITIZENS AND NATIONALS IN TIME OF WAR OR NATIONAL EMERGENCY
EXCEPTIONS TO REGULATIONS

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, dated March 31, 1938, issued under the authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), and section 4 of the act of May 26, 1949 (63 Stat. 111; 5 U.S.C. 151c), I hereby amend paragraph (b) of 53.3, Exceptions to regulations in §53.2 of Title 22 of the Code of Federal Regulations to read as follows:

§53.3 Exceptions to Regulations in 53.2

* * *

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent threreto: *And provided also,*

That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(Sec. 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489)

The regulation contained in this order shall become effective upon publication in the FEDERAL REGISTER. The provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date are inapplicable to this order because the provisions thereof involve foreign affairs functions of the United States.

Dated: January 16, 1961.

For the Secretary of State.

LOY W. HENDERSON
Deputy Under Secretary for
Administration.

(F.R. Doc. 61-506; Filed, Jan. 18, 1961; 8:54 a.m.)

APPENDIX C.

The regulations appearing in Part 53 of Title 22 of the Code of Federal Regulations in their *unamended form* as they appeared *prior to January 16, 1961* (i.e. before promulgation of the "Excluding Cuba" Regulation reproduced in Appendix B above), read in material part as follows:

Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

§53.1 *Definition of the term "United States."* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in §53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in §53.3.

§53.3 *Exceptions to regulations in §53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be appli-

cable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; * * *.

APPENDIX D.

Public Notice 179, January 16, 1961, 26 Fed. Reg. 492, reads in full as follows:

DEPARTMENT OF STATE

[Public Notice 179]

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 C.F.R. 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specially endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration

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APPENDIX E.

Press Release No. 24, January 16, 1961, 44 Dept. of State Bull, 178, reads in full as follows:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

APPENDIX F.

Presidential Proclamation, No. 3004, January 17, 1953, 67 Stat. C31, reads in material part as follows:

A Proclamation

WHEREAS section 215 of the Immigration and Nationality Act, enacted June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * *

5. I hereby direct all departments and agencies of the Government to cooperative with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pur-

suance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

APPENDIX G.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, reads in material part as follows:

A Proclamation

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN

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